

**WHY PRELIMINARY EXAMINATIONS ARE IMPORTANT  
FOR MICHIGAN'S CRIMINAL JUSTICE SYSTEM**

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Overview. The preliminary examination is an integral stage of a felony prosecution which long ago established its substantive importance for the prosecution, the defense and the criminal justice system in general. While not constitutionally mandated, where it is available, as in Michigan, the preliminary examination is a critical stage of the prosecution which enhances the fairness of the subsequent trial.<sup>1</sup> That is, the preliminary examination helps produce more just, accurate results at trial. The proposed legislation to abolish preliminary examinations in many cases unless requested by the prosecution would unnecessarily eliminate all of the substantive benefits of the preliminary examination in order to address the narrow and readily solvable concern of reducing the time spent in court by police officers needed on the street. Because that concern does not outweigh the benefits of the current system and is readily met by far less drastic changes, the abolition proposal is akin to tearing down a stately home because a closet needs cleaning. Contrary to the claims of some supporters, the proposed change would not reduce jail overcrowding and would likely exacerbate that problem. Abolishing preliminary examinations would also dangerously upset the system of checks and balances in the criminal justice system by shifting the ultimate authority as to who stands trial on what charge from the judiciary – the neutral branch of government – to the executive branch – a partisan in the prosecution process.

Discussion. The objectives of efficiency and economy in the preliminary examination process and of freeing more police officers for duty on the streets are worthy objectives. However, eliminating Michigan's long-standing statutory right to a preliminary examination in felony cases in order to achieve these objectives is not the answer.

1. Pre-examination conferences/allowing officers to remain on stand-by status. The objectives of efficiency, economy and freeing more police officers for street duty are best met by scheduling pre-examination conferences prior to the preliminary examination and by allowing officers whose testimony might not be needed to remain on the street on stand-by status rather than waiting in court. Pre-examination conferences are already held in a number of district courts and have been successful in reducing wasted time by police officers, civilian witnesses and attorneys. Legislation requiring a pre-examination conference within seven (7) days of arraignment, with the preliminary examination to occur (if it occurs at all) within another seven (7) days, will meet the objectives of reducing delay and lost time without

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<sup>1</sup>Coleman v Alabama, 399 US 1 (1970).

undermining the basic fairness of the criminal justice process;

2. Shifting power from the judicial to the executive branch. The preliminary examination system properly allocates to the judicial branch (through the examining magistrate) the final word as to what charges the accused faces at trial. Having that decision made by a neutral officer is essential to preserving the checks and balances within the criminal justice system. Eliminating preliminary examinations would radically shift that final word to a partisan in the process – the prosecution. As the Supreme Court famously stressed in an analogous context over half a century ago, in an opinion by Justice Robert Jackson, a former U. S. Attorney General: “The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that *those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*” (emphasis added);<sup>2</sup>

3. Preserving testimony. If a witness testifies at preliminary examination and is subject to cross-examination by defense counsel, the witness’ testimony is admissible as substantive evidence at trial if the witness becomes unavailable to testify at trial.<sup>3</sup> This important rule is often of substantial help to the prosecution.<sup>4</sup> The opportunity to preserve testimony for use at trial would be lost if preliminary examinations are eliminated. This concern is not alleviated by allowing the prosecution to request a preliminary examination, as sometimes the defense, rather than the prosecution, is interested in preserving testimony. By eliminating the defendant’s right to a preliminary examination, the proposed legislation would deprive the defense of a right that should be equally available to both sides. Such legislation would not only be unfair, it would raise substantial due process concerns;

4. Enhancing the reliability of trial testimony. Because preliminary examination testimony is given under oath closest in time to the events in question, the preliminary examination creates a record of that testimony – on both direct and cross-examination – when witnesses’ recollections are as fresh as possible. In doing so, the preliminary examination enhances the reliability of witnesses’ testimony at trial by having their earlier testimony available for refreshing recollection and/or impeaching a subsequent altered recollection. In this way among others, the preliminary examination helps to produce more accurate results at trial;

5. The screening function. Preliminary examinations play a central role in screening those cases which should go to trial from those which should not.

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<sup>2</sup>Johnson v United States, 333 US 10, 13 (1948).

<sup>3</sup>California v Green, 399 US 149 (1970).

<sup>4</sup>Kamisar et al, supra, p 1030.

a. Process of review. Almost all states require either a grand jury indictment or a preliminary examination before an accused may be required to stand trial for a felony.<sup>5</sup> Even those few states which allow for a felony trial without either an indictment or a preliminary examination allow for a probable cause review by the trial judge before trial.<sup>6</sup> Eliminating preliminary examinations would put Michigan in the embarrassing position of providing less critical screening than any other state in the country before requiring a person to stand trial for a felony;

b. Avoiding trials in cases not supported by the evidence; reducing or raising

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<sup>5</sup>See Kamisar *et al.*, Modern Criminal Procedure (11<sup>th</sup> ed) at pp 1035-1036 (2005): “The vast majority of jurisdictions provide for an independent review by requiring (unless waived by the defendant) either or both a grand jury indictment (with the grand jury providing the screening) or a preliminary hearing bindover (with the magistrate providing the screening)... [A] small group of states have introduced a third procedure for providing independent screening. That procedure is commonly described as ‘direct filing’... All direct-filing systems provide an opportunity for judicial review of the decision to charge (typically by the felony trial court rather than the magistrate).”

<sup>6</sup>*Id.*

charges where appropriate. When cases which cannot meet even the low threshold of probable cause are dismissed at the conclusion of a preliminary examination, or when specific charges not supported by the evidence are reduced, the screening function of the examination saves both the prosecution and the defense substantial money and resources that would otherwise be spent at trials which should not occur.<sup>7</sup> In other cases, the magistrate's authority to bind over on an offense as to which probable cause has been shown can result in bindover on greater and/or additional charges as appropriate;<sup>8</sup> and

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<sup>7</sup>It is noteworthy that the bill would not require a preliminary examination in any case prosecuted under the Medicaid False Claim Act, MCLA §400.601 *et seq.*, or the Health Care False Claim Act, MCLA §752.1001 *et seq.* Alleged violations of these and related acts are among the relatively small percentage of Michigan criminal cases prosecuted directly by the Attorney General. Available anecdotal evidence suggests that the incidence of conducting preliminary examinations in such cases is far higher than in criminal cases overall *and* that dismissals for failure of proof at the conclusion of examinations are far more frequent than in criminal cases overall.

<sup>8</sup>See MCR 6.110(E): "If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial."

c. Encouraging pleas in appropriate cases. In a significant number of cases, witnesses' testimony at a preliminary examination leads the accused to understand the strength of the prosecution's case. As a result, the examination process – which is far more economical than is a trial – results in negotiated guilty pleas which the accused would be less likely to accept without having observed the witnesses' testimony at a preliminary examination;<sup>9</sup>

6. Leveling the playing field. The prosecution has at its disposal far more investigative resources and tools than does the defense, including police officers available to interview witnesses and search warrants and investigative subpoenas to compel disclosure of information. By providing the defense with an opportunity to observe and cross-examine the prosecution's witnesses, the preliminary examination materially helps to remedy the consequences of this imbalance. The preliminary examination also provides important opportunities for both sides to assess witnesses' credibility and demeanor, identify the strengths and weaknesses of their respective cases and determine which issues need to be addressed in discovery and other aspects of trial preparation;

7. Opportunity for bail review. Initial bail decisions are usually made with only minimal information available to the arraigning magistrate. A preliminary examination provides an important opportunity for the examining magistrate to learn more about the case and the accused and to adjust the bail accordingly.<sup>10</sup> Abolishing preliminary examinations would not only eliminate this important opportunity for district judges to review the amount of bail, it would result in more bail reduction motions being brought in circuit court, increasing the workload of circuit judges and often delaying the ultimate decision on bail

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<sup>9</sup>*Cf. Kamisar et al., supra*, at p 1033: "The preliminary hearing also may serve as an integral part of the plea bargaining process, particularly where negotiations have been undertaken prior to the hearing. The hearing may then operate as a valuable 'educational process' for the defendant who is not persuaded by his counsel's opinion that the prosecution has such a strong case that a negotiated plea is in the defendant's best interest."

<sup>10</sup>*Cf. Kamisar et al., supra*, at pp 1032-1033; see also *Coleman, supra*, 399 US at 9.

reduction.<sup>11</sup> For these reasons, the current preliminary examination system is far more useful in reducing jail overcrowding;

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<sup>11</sup>Because many discovery issues are also currently addressed in district court at the time of preliminary examination, abolishing preliminary examinations would shift to circuit court the litigation of these questions, too.

8. All felonies are serious offenses; the collateral consequences of a felony conviction often outweigh the direct consequences. For individuals holding professional licenses and for individuals who are not citizens, a felony conviction can have devastating consequences regardless of the sentence imposed. For the licensed professional, the fact of a conviction itself can result in the suspension or revocation of the license;<sup>12</sup> for the non-citizen, the conviction can, in a broad range of circumstances, result in deportation.<sup>13</sup> Because the preliminary examination is important to protecting the right to a fair trial and avoiding unwarranted convictions, the abolition proposal unreasonably risks more unwarranted losses of professional licenses and more unwarranted deportations, too; and

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<sup>12</sup>*Cf.*, e.g., MCLA §333.16221(b)(v) (licensed health professionals); MCR 9.104(A)(5) and MRPC 8.4(b) (attorneys).

<sup>13</sup>8 USC §1227(a)(2).

9. Quality of defense representation. One of the Attorney General's points in support of the proposed legislation is that preliminary examinations are unnecessary because so few are conducted. While many preliminary examinations are, in fact, waived, the reason for many of these waivers points to an altogether different solution. In large part, the low incidence of preliminary examinations being conducted is a product of poor representation by defense counsel, a problem greatly exacerbated by the woefully inadequate level of compensation of appointed attorneys in Michigan. In a recent Bar Journal column in her capacity as current president of the State Bar, Assistant Wayne County Prosecutor Nancy Diehl importantly noted: "Michigan has the dubious distinction of being among the lowest in the country when it comes to assigned counsel fees. Robert Spangenberg, of the Spangenberg Group of Massachusetts, is a national expert on assigned counsel rates and systems. He studied the Michigan system in the 90s and again within the last two years and ranks Michigan in the bottom three states in the country."<sup>14</sup> Abolishing preliminary examinations because incompetent defense attorneys are waiving them when they should not would turn the actual problem on its head.

Conclusion. How one views the rights of an accused person largely depends on the perspective from which one is looking. If one views accused persons as probably guilty s.o.b.s, there is an understandable temptation to take a narrow view of the rights they should have. When one understands that the right you take away from that guilty s.o.b. is also taken away from your neighbor you think is wrongly accused or your friend's teenager who has gotten into trouble and might well be innocent, that narrow view makes a lot less sense. The preliminary examination as a judicial screening device to ensure that charges brought against an accused are based on adequate evidence grew out of the real life experiences of those who came before us. Their experiences are as valid and instructive today as they were generations ago. Eliminating this historically grounded, substantively important right in the guise of making more police officers available for duty on the street – and

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<sup>14</sup>Diehl, Nancy, "What If You Couldn't Afford Perry Mason?", Mich Bar J 83:11 (November 2004). See also Recorder's Court Bar Association v Wayne Circuit Court, 443 Mich 110, 115 (1993), citing with approval the findings of Special Master Hon. Tyrone Gillespie:

"The incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed. Under the current system, a lawyer can earn \$100 an hour for a guilty plea, whereas if he or she goes to trial the earnings may be \$15 an hour or less. Essential motions are neglected.

"In short, the system of reimbursement of assigned counsel as it now exists creates a conflict between the attorney's need to be paid fully for his services and obtaining the full panoply of rights for the client. Only the very conscientious will do the latter against his or her own interests."

The compensation format in Wayne County has not improved since Recorder's Court Bar Association was decided and has, in fact, become even more problematic.

radically shifting the balance of power in the legal system at the same time – is a bad idea under any circumstances. It is a particularly bad idea when one realizes that the right taken away is no longer there to protect either the innocent or the guilty.